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July 2, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: March 30, 2004

Case No.: TIA-0071

XXXXXXXXXXXXX (the applicant or "Applicant") applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility for five years. The OWA referred her application to an independent physician panel, which determined that the Applicant's illness was not related to her work at DOE. The OWA accepted the panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals challenging the panel's determination.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 7384l(1). The DOL program also provides federal monetary and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance at

a DOE facility. 42 U.S.C. § 7385o. In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3).

The DOE program is specifically limited to DOE contractor employees who worked at DOE facilities. This limitation exists because DOE would not be involved in state workers' compensation proceedings involving other employers. The applicant states that she was employed by Oak Ridge National Laboratory (ORNL) from 1989 to 1994, and that she became ill as a result of that employment. Pursuant to an Executive Order, ^{1/} the DOE has published a list of facilities covered by the DOL and DOE programs, and the DOE has designated next to each facility whether it falls within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 68 Fed. Reg. 43,095 (July 21, 2003) (current list of facilities). The DOE's published list also refers readers to the OWA web site for additional information about the facilities. 68 Fed. Reg. 43,095. Oak Ridge is a DOE facility.

The regulations for the DOE program are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The OWA is responsible for this program and has a web site that provides extensive information concerning the program. ^{2/} This case involves the DOE program, i.e., the program through which DOE contractor employees may obtain independent physician panel determinations that their illness is related to their exposure to a toxic substance during their employment at a DOE facility. The applicant asserts that the Panel's decision was incorrect for several reasons. Letter from Applicant to Director, Office of Hearings and Appeals (March 30, 2004). First, the applicant alleges that she did not wear a dosimeter when she performed inspections at the Paducah Plant and at the High Flux Reactor at ORNL. Second, the applicant is most concerned over alleged contamination in the attic of Building 2001 at ORNL. The applicant contends that the building is "highly contaminated" and that she and all of the women housed in the building developed breast cancer.

The Physician Panel reviewed the application and issued a report. See OWA Physician Panel Report (February 4, 2004) (Report). The Panel unanimously determined that it was unlikely that exposure to a toxic substance at a DOE facility during the course of the Applicant's employment was a significant factor in aggravating, contributing to or causing the applicant's illness. In the appeal, the applicant disagrees with that determination.

^{1/} See Executive Order No. 13,179 (December 7, 2000).

^{2/} See www.eh.doe.gov/advocacy.

II. Analysis

The applicant claims that the Panel decision is incorrect. She contends that during portions of her employment (specifically, inspections at the Paducah Plant and the High Flux Reactor at ORNL) she was not monitored for exposure to radiation via a dosimeter. She is very concerned about exposure in Building 2001 at the ORNL, a building that she alleges is highly contaminated. In addition, she contends that only one other person in her family has ever had cancer –her father, who had worked at Oak Ridge in the 1940s to 1950s, without safety gear.

The Panel report specifically addresses the applicant's contention that she was exposed to significant amounts of radiation. The report states that "the latency period for the clinical detection of breast cancer is probably much longer than five years." This statement was based on a recent medical journal which defined "significant" radiation exposure as exposure for at least five days a week for more than seven years. Applicant was exposed to radiation for five years. The Panel notes that even among over 1000 females who worked at Y-12 between 1947 and 1990 at jobs with a high risk of exposure to radiation and chemicals, only 11 women died from breast cancer, a statistically insignificant percentage. The study was conducted during a time prior to "close environmental monitoring." Finally, the report notes that the applicant's recorded dosimetry readings were close to zero.

The Panel report also addresses the applicant's apparent assertion that she has no other risk factors for breast cancer. The Panel notes that although 70% of women diagnosed with breast cancer have no identifiable risk factors, the applicant had fibrocystic disease, which probably increased her risk of developing breast cancer.

With regard to the Panel's determination concerning the individual's breast cancer, we find that there is no basis to remand this decision. Our review of the record supports the panel's finding that there was no documentary evidence indicating that the Applicant had a significant exposure to radiation. In fact, the Applicant indicated in her termination statement of December 15, 1999 that she had not been exposed to radiation or toxic materials above the permissible limit. We have reviewed the record of this case for any evidence that Building 2001 was highly contaminated as described by Applicant, and find no evidence to support that allegation. The record also contains no evidence regarding the number of women who worked at Building 2001 and developed breast cancer. Accordingly, we find no error in the Panel's decision.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0071 be, and hereby is, denied.

- (2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: July 2, 2004

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